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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ISAIAH WASHINGTON, Defendant and Appellant.	A158017 (Alameda County Super. Ct. No. H53084A)

Isaiah Washington appeals from the denial of his petitions for resentencing pursuant to Penal Code section 1170.95,[1] which provides for resentencing of individuals convicted of murder under a felony murder or natural and probable consequences theory if they could no longer be convicted of murder under January 1, 2019 amendments to the Penal Code. Because Washington is ineligible for resentencing under section 1170.95, we affirm.

BACKGROUND

A.

To be convicted of murder, a jury must ordinarily find that the defendant acted with the requisite mental state, known as " 'malice aforethought.' " (*People v. Chun* (2009) 45 Cal.4th 1172, 1181 (*Chun*),

[1] All undesignated statutory references are to the Penal Code.

quoting section 187, subdivision (a).) The felony murder rule, however, provided an exception that made "a killing while committing certain felonies murder without the necessity of further examining the defendant's mental state." (*Id* at p. 1182.) Under a separate rule known as the natural and probable consequences doctrine, a " ' "person who knowingly aids and abets criminal conduct is guilty of not only the intended crime . . . but also of any other crime the perpetrator actually commits . . . that is a natural and probable consequence of the intended crime.' " ' (*People v. Chiu* (2014) 59 Cal.4th 155, 161.)

Senate Bill 1437, which became effective January 1, 2019, raised the level of culpability required for murder liability to be imposed under these theories. (Stats. 2018, ch. 1015, § 1, subd. (f), p. 6678.) Senate Bill 1437 amended section 189, which defines the degrees of murder, to limit murder liability based on felony murder or a natural and probable consequences theory for a person who: (1) was the actual killer; (2) though not the actual killer, acted "with intent to kill" and "aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer" in the commission of first degree murder; or (3) was "a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (§ 189, subd. (e); *People v. Verdugo* (2020) 44 Cal.App.5th 320, 326 (*Verdugo*), review granted March 18, 2020, No. S260493.) Senate Bill 1437 also amended the definition of malice in Penal Code section 188, to provide that "[m]alice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3); *Verdugo*, *supra*, 44 Cal.App.5th at p. 326.)

Senate Bill 1437 also added section 1170.95, which provides that "[a] person convicted of felony murder or murder under a natural and probable

consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts." (§ 1170.95, subd. (a).) The individual may file a petition if three conditions are met: "(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to [Penal Code] Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subds. (a)(1)-(3).) Under subdivision (b), the petition must include a declaration that the petitioner is eligible for relief based on the requirements above; the case number and year of the conviction; and whether the petitioner requests the appointment of counsel. (§ 1170.95, subd. (b)(1).)

B.

Washington's criminal case arose from a May 2010 incident in Hayward, California, that left two victims dead from multiple gunshot wounds. One of the murder victims, who died shortly after police arrived at the scene, told the police, "They shot me and took my money." A third victim managed to escape and was the primary witness at trial.

In December 2012, the District Attorney of Alameda County filed an information charging Washington and a co-defendant with two counts of murder (§ 187, subd. (a)), and one count of attempted murder (§§ 187, subd. (a) & 664, subd. (a)). Washington was also charged with possession of a firearm by a felon (§ 12022.1).

The information alleged as special circumstances that Washington and his co-defendant committed more than one murder (§ 190.2, subd. (a)(3)) and that they committed the murders while committing a robbery (§ 190.2, subd. (a)(17)(A)). Regarding the murder and attempted murder counts, the information alleged Washington and his co-defendant personally used firearms (§§ 12022.5, subd. (a) & 12022.53, subds. (b) and (g)).

In March 2015, a jury convicted Washington and his co-defendant on all counts. The jury found the two murder counts were of the first degree. For each count of murder, the jury found true the special circumstance that Washington and his co-defendant committed the murder while they were engaged in the commission of robbery "within the meaning of Penal Code 190.2(a)(17)(A)." The jury also found true the firearm use allegations.

In September 2015, the trial court sentenced appellant Washington to prison for two consecutive terms of life without the possibility of parole. The court imposed concurrent sentences for attempted murder and illegal firearm possession. On appeal, this Court affirmed the judgment as to Washington. (*People v. Washington* (2018) Cal.App.Unpub.LEXIS 7619 (Nov. 9, 2018, A146433) [nonpub. opn.].) In a separate appeal, we affirmed the trial court's denial of a motion for modification of Washington's sentence. (*People v. Washington* (2019) Cal.App.Unpub.LEXIS 8627 (Dec. 27, 2019, A158292) [nonpub. opn.].)

C.

Washington filed two identical petitions for resentencing under section 1170.95. Each petition included a declaration stating that he was convicted of first or second degree murder pursuant to the felony murder rule or the natural and probable consequences doctrine and that he could not now be convicted of first or second degree murder because of the amendments to

Penal Code sections 188 and 189 effective January 1, 2019. In addition, his declaration stated: "I was not the actual killer"; "I did not, with the intent to kill, aid, abet, counsel, command, induce, solicit, request, or assist the actual killer in the commission of murder in the first degree"; and "I was not a major participant in the felony **or** I did not act with reckless indifference to human life during the course of the crime or felony." Washington also requested the appointment of counsel.

After taking judicial notice of its own records as well as the November 9, 2018 opinion of this Court, and without appointing counsel, the trial court denied the petitions. The court concluded that Washington is ineligible for resentencing as a matter of law because, in finding the allegation of a special circumstance true, the jury found that "the petitioner acted with reckless indifference to human life *and* was a major participant in the robberies which resulted in the death of two people."

DISCUSSION

Applying a de novo standard of review, we conclude that the trial court correctly denied Washington's resentencing petitions. (See, e.g., *Taylor v. Department of Industrial Relations Etc.* (2016) 4 Cal.App.5th 801, 807 [constitutional and statutory construction questions are reviewed de novo]; *Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal.4th 277, 287 [questions of law are subject to de novo review].)

A.

Preliminarily, Washington contends the trial court was required to accept at face value his statement that he could not be convicted of first or second degree murder because of the amendments made by Senate Bill 1437 and also that the court erred in considering the previous decision of this Court affirming his conviction.

The trial court was not required to accept his statements at face value. After a trial court determines a petition is facially sufficient (see § 1170.95, subd. (b)(2)), the court "shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section." (§ 1170.95, subd. (c); *Verdugo*, *supra*, 44 Cal.App.5th at pp. 328-329.) The court's role at this stage is "to decide whether the petitioner is ineligible for relief as a matter of law, making all factual inferences in favor of the petitioner." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 329.) Information from the record of conviction (including the charging documents, jury instructions, and verdict forms) could conclusively establish ineligibility, such as in cases in which the individual was not prosecuted under a felony murder or natural and probable consequences theory or the conviction was not for first or second degree murder. (See § 1170.95, subd. (a)(1)-(2); *Verdugo*, *supra*, 44 Cal.App.5th at p. 330.) Accordingly, the trial court may consider information from the record of conviction indicating the basis of the conviction.[2] (See *Verdugo*, *supra*, 44 Cal.App.5th at pp. 329-330; *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1137-1138 (*Lewis*), review granted March 18, 2020, No. S260598.)[3]

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[2] We take judicial notice of the record of appeal filed in this Court for Washington's two prior appeals, in case numbers A146433 and A158292. (See *People v. Vizcarra*, 236 Cal.App.4th 422, 426 fn. 1 [taking notice of record on appeal from defendant's prior appeal].) Judicial notice is appropriate because the trial court properly took notice of its own records, which contain the record of conviction; and the parties' briefs cite records from the prior appeals, which – unlike the record on appeal in the instant case – contain the record of conviction. (See Evid. Code §§ 459, subd. (a); 452, subd. (d).)

[3] On March 18, 2020, our Supreme Court granted review on the following questions relevant to Washington's appeal: "(1) May superior courts consider the record of conviction in determining whether a defendant has made a prima facie showing of eligibility for relief under Penal Code section

The trial court may also consider a prior appellate opinion in the underlying criminal case as it bears on aspects of the petitioner's conviction – for example, by showing the conviction was affirmed, as was the case here. (See *People v. Woodell* (1998) 17 Cal.4th 448, 456-457 (*Woodell*) [holding that the record of conviction includes not only the trial court record but also an appellate opinion, at least for nonhearsay purposes]; *Verdugo*, *supra*, 44 Cal.App.5th at p. 333 ["A court of appeal opinion, whether or not published, is part of the appellant's record of conviction."].)

Although Washington asserts that the trial court erred in relying on the factual summary contained in this Court's November 9, 2018, opinion, any error in this regard would have been harmless because, as we explain below, Washington is ineligible for resentencing based on the jury's special circumstances finding.

B.

After considering the information, jury instructions, and verdict forms underlying Washington's conviction, we affirm the trial court's conclusion that he failed to make a prima facie showing of eligibility for resentencing under section 1170.95.

Washington's petitions assert: the charge against him permitted the prosecution to proceed on a theory of felony murder; he was convicted of first degree murder; and he could not be convicted of first or second degree murder after the amendments at issue here. While the first two statements are not in doubt, the final assertion – that under the new law he could no longer be convicted of first or second degree murder – is incorrect as a matter of law.

1170.95? (2) When does the right to appointed counsel arise under Penal Code section 1170.95, subdivision (c)." (*People v. Lewis*, review granted March 18, 2020, No. S260598.)

Washington's briefing does not dispute that, in finding him guilty of first degree murder, the jury also found true the special circumstance allegation that he committed murder while engaged in the commission of a robbery within the meaning of section 190.2, subdivision (a)(17)(A). Section 190.2 authorizes a sentence of life without the possibility of parole for an individual convicted of first degree murder if the murder is committed during the course of a robbery and one of the following circumstances is true: the individual is the actual killer; the individual is not the actual killer but "with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists" another actor in first degree murder; or the individual is not the actual killer but "with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists" in the commission of a robbery which led to the death of a person. (§ 190.2, subds. (a)(17)(A), (b)-(d).) Accordingly, to find the special circumstances true, the trial court instructed the jury that, if they determined Washington was not the actual killer, then they would have to find either that he acted as an aider and abettor with intent to kill or that he "was a major participant in the crime" and "acted with reckless indifference to human life" when he participated in the crime.

Critically, the new "standard under section 189, subdivision (e)(3) for holding [] a defendant liable for felony murder is the same as the standard for finding a special circumstance under section 190.2(d), as the former provision expressly incorporates the latter." (*In re Taylor* (2019) 34 Cal.App.5th 543, 561; see also *People v. Gutierrez-Salazar* (2019) 38 Cal.App.5th 411, 419 ["The language of the special circumstance tracks the language of Senate Bill 1437 and the new felony-murder statutes."].) Thus, in finding the special circumstance to be true, the jury necessarily found, at a minimum, that

Washington was a major participant in the robbery which resulted in the death of a person and acted with reckless indifference to human life. As a result, he could still be convicted of felony murder under section 189 as amended and is therefore ineligible for resentencing as a matter of law.

Washington nowhere disputes on the merits that, once his record of conviction is considered, he could still be convicted of felony murder after Senate Bill 1437. He contends that, because section 1170.95, subdivision (d)(3) allows the petitioner to present "new or additional evidence" in support of resentencing, the trial court could not conclusively determine his ineligibility prior to holding a hearing. But Washington has not presented or even referred to any new evidence that would establish his eligibility; neither has he challenged the sufficiency of the evidence to support the special circumstance finding. Washington's attempt to analogize to habeas corpus petitions is unavailing, as such petitions must state "fully and with particularity the facts on which relief is sought" and may not rest on " '[c]onclusory allegations made without any explanation' " of their basis. (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) At most, Washington has provided conclusory assertions that he was not a major participant and did not act with reckless indifference to human life. Such bare assertions, unsupported by specific evidence, are insufficient to make a prima facie showing in the face of the jury's verdict. (See *Lewis*, *supra*, 43 Cal.App.5th at p. 1139.)[4]

In sum, the trial court did not err in summarily denying Washington's petitions. The jury's special circumstance findings make him ineligible for

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[4] For the same reason, we reject Washington's argument that the trial court erred in not affording him a hearing. The trial court was not obligated to do so unless Washington demonstrated his prima facie entitlement to relief (§ 1170.95, subds. (c)).

resentencing under section 1170.95 as a matter of law, and his petitions presented no basis for revisiting those findings.

C.

Washington contends that the trial court's failure to appoint counsel violated his state and federal constitutional rights to due process and the assistance of counsel. Because Washington has not set forth a prima facie case that he falls within section 1170.95, however, we conclude that the denial of counsel did not violate his constitutional rights.

The potential constitutional issue arises because section 1170.95 does not mandate counsel during the trial court's initial assessment to determine whether the petition has established a prima facie case that the petitioner falls within the statute. *Lewis* and *Verdugo* considered this question and concluded that the text and structure of section 1170.95 indicate that the requirement arises only *after* the trial court's determination that the petition sets forth such a prima facie case. (See *Lewis*, *supra*, 43 Cal.App.5th at p. 1140; *Verdugo*, *supra*, 44 Cal.App.5th at pp. 332-333.) The first sentence of section 1170.95, subdivision (c), requires the trial court to make a prima facie showing; the second sentence mandates the appointment of counsel if requested; and the third sentence requires the prosecutor to file and serve a response and allows the petitioner to file a reply. "The structure and grammar of this subdivision indicate the Legislature intended to create a chronological sequence: first, a prima facie showing; thereafter, appointment of counsel for petitioner; then, briefing by the parties." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 332; see also *Lewis*, *supra*, 43 Cal.App.5th at p. 1140.)

This sequence makes sense given the greater role for counsel to play in responding to the prosecution's brief, which would only be necessary if the petition succeeds at the first prima facie stage. (*Verdugo*, *supra*, 44

Cal.App.5th at p. 332.) It also conserves public resources by avoiding appointment of counsel in cases where the petitioner is ineligible for relief as a legal matter. We agree with the analyses in *Lewis* and *Verdugo* and hold that the trial court did not violate section 1170.95 in declining to appoint counsel before concluding that Washington did not establish a prima facie case that he fell within the statute. (See also *People v. Cornelius* (2020) 44 Cal.App.5th 54, 58 [holding that § 1170.95 does not mandate appointment of counsel where the petitioner "is indisputably ineligible for relief"], review granted, March 18, 2020, No. S260410.)

Neither does the statute contravene Washington's constitutional rights given that he is unable to meet the threshold requirement of eligibility for relief. As our Supreme Court has held in the context of post-conviction coram nobis petitions, "in the absence of adequate factual allegations stating a prima facie case, counsel need not be appointed in the trial court." (*See People v. Shipman* (1965) 62 Cal.2d 226, 232 (*Shipman*) ["Neither the United States Constitution nor the California Constitution compels" the "appoint[ment] [of] counsel for every prisoner who asserts that there may be some possible ground for challenging his conviction"]); see also *In re Clark* (1993) 5 Cal.4th 750, 780 ["the appointment of counsel is demanded by due process concerns" if a post-conviction "petition attacking the validity of a judgment states a prima facie case leading to issuance of an order to show cause"], citing *Shipman*, *supra*, 62 Cal.2d at pp. 231-232; *People v. Rouse* (2016) 245 Cal.App.4th 292, 300 (*Rouse*) [same].) Washington's citation to *Rouse* is unavailing: although *Rouse* held that a petitioner who had established eligibility for relief was entitled to counsel at his re-sentencing hearing, it did not address whether counsel would be required before a petitioner established eligibility. (*Rouse*, *supra*, 245 Cal.App.4th at p. 301.)

DISPOSITION

The judgment is affirmed.

BURNS, J.

We concur:

JONES, P.J.

SIMONS, J.

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